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BEFORE THE

IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF APPLICATION OF IDAHO POWER COMPANY TO UPDATE ITS WIND INTEGRATION RATES AND CHARGES.	IPC-E-13-22 **MOVANTS REQUEST FOR LEAVE TO FILE REPLY AND MOVANTS' REPLY IN SUPPORT OF MOTION TO DISMISS**

I. INTRODUCTION

Cold Springs Windfarm, LLC, Desert Meadow Windfarm, LLC, Hammett Hill Windfarm, LLC, Mainline Windfarm, LLC, Ryegrass Windfarm, LLC, Two Ponds Windfarm, LLC, Cassia Wind Farm LLC, Hot Springs Windfarm, LLC, Bennett Creek Windfarm, LLC,

Cassia Gulch Wind Park LLC, Tuana Springs Energy, LLC, and High Mesa Energy, LLC (collectively "Movants") hereby request that the Idaho Public Utilities Commission ("IPUC" or "Commission") accept and consider this Reply to Idaho Power Company's ("Idaho Power" or the "Company") Answer to Movants' Motion to Dismiss. As explained below, Idaho Power has pointed to no credible reason or legal basis why the Commission should consider its request to unilaterally modify the terms in Movants' contractual legally enforceable obligations, and the applicable procedural rules therefore support dismissal at this time. In fact, any action short of that requested by Movants would endorse Idaho Power's ongoing efforts to subject the rates in Movants' fixed-price Firm Energy Sales Agreements ("FESA") to utility-type regulation barred by the Public Utility Regulatory Policies Act of 1978 ("PURPA").

II. REQUEST FOR LEAVE TO REPLY

The applicable rules do not expressly provide for, or prohibit, a reply to an answer to a motion to dismiss. *See* IPUC Rules of Procedure ("RP") 56, 256. However, the Commission has recently accepted a responsive pleading to an answer to a motion to dismiss. *See In re Petition of J.R. Simplot Co. for a Determination of Price Regarding the Purchase and Acquisition of Certain Assets Owned by Idaho Power Co.*, IPUC Case No. IPC-E-13-17, Order No. 32970 at 4 (2013) (discussing Idaho Power's "supplemental" filing made in response to an answer to Idaho Power's motion to dismiss). Movants respectfully request that the Commission accept and consider this Reply made within a week of Idaho Power's Answer because it will clarify the issues before the Commission and not unduly delay a decision. Further, without an opportunity to reply, Movants would be left without the opportunity to address new arguments in Idaho Power's Answer.

III. REPLY ARGUMENT

A. PURPA Bars Idaho Power's Attempt to Subject the Rates in Movants' Contractual Legally Enforceable Obligations to Routine Commission Proceedings.

Idaho Power's Answer fundamentally misunderstands PURPA. Idaho Power suggests that proceedings to revaluate the rates in fixed-price PURPA contracts are "expected and routine." *See* Answer at 6. Movants disagree. PURPA unquestionably conflicts with, and therefore preempts, such ongoing utility-type proceedings to reexamine the fixed prices in Movants' FESAs. *See, e.g.,* 16 U.S.C. § 824a-3(b) and (e)(1); 18 C.F.R. §§ 292.304(b)(5), (d)(2)(ii), -292.602; *Ind. Energy Prod. Ass'n, Inc. v. Cal. Pub. Util. Comm'n*, 36 F.3d 848, 857-58 (9th Cir. 1994); *Freehold Cogeneration Assoc., L.P. v. Bd. of Reg. Com'rs of State of N.J.*, 44 F.3d 1178, 1194 (3rd Cir. 1995). Idaho Power has not even cited, let alone attempted to distinguish, these controlling authorities.

The Commission itself ruled that fixed-price PURPA contracts are not subject to revision long before the leading federal authorities even reached the issue. In 1985, the Commission declared, "Notwithstanding Idaho Power's arguments, it has been this Commission's consistent position that federal law requires that [cogeneration and small power production facilities] are entitled to fixed-term, fixed-rate agreements." *See In re Complaint of Bonneville Pacific Corp. et al.*, IPUC Case Nos. U-1006-249, U-1006-256, U-1006-259, U-1006-260, U-1006-261, U-1006-262, U-1006-263, Order No. 19837 (1985). The Commission further rejected Idaho Power's reliance on Idaho Supreme Court's then-recent *Afton* line of decisions, explaining, "There was nothing therein that ruled that the Commission has jurisdiction to revise these agreements." *Id.* This Commission precedent has remained unchanged for three decades, and there is no basis to depart from it.

Despite Idaho Power's contention, Movants' accurately cited the holdings from multiple federal courts that have enjoined state administrative proceedings that conflicted with, and were thus preempted by, federal statutes. In the cases cited by Movants, federal courts determined that a challenge to a state proceeding was ripe to be enjoined by the federal courts prior to the time that it had progressed to its conclusion. *See Pub. Util. Comm'n v. United Fuel Gas Co.,* 317 U.S. 456, 465, 470 (1943); *Freehold Cogeneration Assoc., L.P.*, 44 F.3d at 1189; *Sayles Hydro Assoc. v. Maughan,* 985 F.2d 451, 454 (9th Cir.1993); *Middle South Energy, Inc. v. Ark. Pub. Serv. Comm'n*, 772 F.2d 404, 412-13, 418 (8th Cir. 1985). Idaho Power is wrong to claim these cases were not based in preemption. *See* Answer at 5. Each cited case held that a state proceeding was preempted or otherwise barred by federal law. That the courts also ruled that an injunction could issue from a federal court prior to the conclusion of a state proceeding does not nullify the underlying holding of preemption. In this case, just as in *Freehold Cogeneration Assoc., L.P.*, the immediate harm is that denial of the Motion to Dismiss will subject Movants' FESAs to a utility-type re-examination of the avoided cost rates contained therein. PURPA bars such utility-type regulation.

Idaho Power's attempts to explain away its request as legitimate are wholly unavailing. Although Idaho Power argues that its request to adjust the rates in Movants' FESAs is only one of three recommendations Idaho Power's Application sets forth, Idaho Power has not withdrawn the request to unilaterally modify the rates in existing FESAs. Moreover, Idaho Power explicitly requested "two specific changes." *See* Answer at 8 ("Change One: abandon the use of percentage of avoided cost rate allocation and instead allocate a fixed amount based upon penetration level; Change Two: decouple the wind integration charge from the avoided cost rate

contained in the power sales agreement and instead have wind integration costs assessed as a stand-alone tariff charge."). Idaho Power has provided no assurance its requests will leave Movants unaffected. Movants cannot simply ignore Idaho Power's request to modify their FESAs, and instead would need to participate in a preempted proceeding if the Motion to Dismiss is not granted, at a considerable cost. Idaho Power also contends that granting the Motion to Dismiss would cause undue delays. However, any delay would result purely from Idaho Power's decision to force Movants into this docket by recommending the Commission should approve Idaho Power's request to unilaterally modify Movants' FESAs.

In short, Idaho Power has presented no credible support for its claim that updates to wind integration rates or any other aspect of Movants' fixed avoided cost rates should be "expected and routine." To the contrary, the administrative process itself imposes an illegal burden on Movants, and the Commission should therefore grant the Motion to Dismiss.

B. Dismissal of Idaho Power's Application Is Procedurally Proper.

Instead of meaningfully addressing the Movants' right under PURPA to be relieved of this proceeding, Idaho Power focuses heavily on procedural arguments. According to Idaho Power, Movants must bear the burden of adjudicating the remainder of this "routine" proceeding to re-examine the fixed prices in Movants' FESAs, even though the Commission has no authority to adjust Movants' fixed-price FESAs. Movants disagree. The applicable procedural rules support, and indeed compel, dismissal at this time.

1. The Commission's Rules of Procedure support dismissal at this time.

Idaho Power relies heavily on its contention that the court rules prohibit the Commission from granting the Motion to Dismiss. In doing so, Idaho Power overlooks that Movants have

properly cited and relied upon IPUC RP 56 and 256, which plainly support dismissal. *See* Motion to Dismiss at 1, 9 n.4. The court rules, upon which Idaho Power bases its position, do *not* bind the Commission. *See McNeal v. Idaho Pub. Util. Comm'n*, 142 Idaho 685, 690, 132 P.3d 442, 477 (2006), *abrogated on other grounds by Verska v. Saint Alphonsus Regional Medical Center*, 151 Idaho 889, 895, 265 P.3d 502, 508 (2011). In *McNeal*, the appellant from a Commission proceeding argued that the Commission had erred by failing to adhere to the Idaho Rules of Civil Procedure. The Idaho Supreme Court held that the Commission has its own rules and therefore rejected this argument. *Id.* In the words of the Court, the "claim for application of the Rules of Civil Procedure in the Commission is without merit." *Id.*

In this case, in addition to citing Idaho R. Civ. Pro. 12(c), Movants filed their motion to dismiss under IPUC RP 56 and 256. Those Commission rules plainly provide for dismissal. For example, in a recent decision, the Commission considered a customer's application to determine the appropriate price at which Idaho Power should sell utility property to the customer. *See In re Petition of J.R. Simplot Co. for a Determination of Price Regarding the Purchase and Acquisition of Certain Assets Owned by Idaho Power Co.*, IPUC Case No. IPC-E-13-17, Order No. 32970 at 6 (2013). Without mentioning the Idaho Rules of Civil Procedure, the Commission granted Idaho Power's motion to dismiss, stating "we grant Idaho Power's Motion to Dismiss based on the Commission's lack of jurisdiction to compel the Company to sell its property." *Id.* at 6. The Commission reasoned, "A valuation of the property by the Commission is meaningless if the Company is unwilling to sell at anything less than its stated price." *Id.*

The same result flows from application of the Commission's rules in this case. Idaho Power has provided no credible basis for the Commission's authority to alter the terms or rates in

Movants' FESAs. Nor has Idaho Power pointed to any further factual or evidentiary dispute that might lead to a conclusion the Commission possesses such authority. Movants do not challenge the right of Idaho Power or the Commission to update its system analysis, the costs on the system or how it allocates such costs to new projects, provided such analysis complies with legally enforceable contractual obligations and the law. However, engaging in a valuation of the current wind integration charge which Idaho Power proposes to apply to Movants' FESAs would be a meaningless waste of resources for the Commission and Movants because Movants have not consented to changing the terms of their FESAs or to sell their output at anything less than the price stated therein. The Commission should grant the Motion to Dismiss by applying its own procedural rules and recent precedent.

2. Even if court rules applied to the Motion to Dismiss, dismissal is still proper.

Idaho Power claims that Movants improperly cited Idaho R. Civ. Pro. 12(c), as the most analogous court rule the Commission could apply to a preemption argument. However, to the extent that the Commission looks to court rules, Rule 12(c) is the proper rule that governs a motion to dismiss relying upon preemption. *See Helman v. Alcoa Global Fasteners, Inc.*, 637 F.3d 986, 988-92 (9th Cir. 2011) (affirming dismissal under Fed. R. Civ. Pro. 12(c) on preemption grounds); *Fisher v. Halliburton*, 667 F.3d 602, 609 (5th Cir. 2012) ("a defendant should ordinarily raise preemption in a Rule 12(c) motion for judgment on the pleadings or a Rule 56 motion for summary judgment").[1]

Idaho Power also argues that the summary judgment rule controls. While Movants agree

[1] Movants titled their Motion a "motion to dismiss" instead of a "motion for judgment on the pleadings" because, as noted above, a motion to dismiss is proper under the Commission's rules and precedent, which do not specify motions for judgment on the pleadings.

that courts generally treat a Rule 12(c) motion similarly to a motion for summary judgment, the result is the same in this case. Under the summary judgment rule, the nonmoving party cannot rest upon mere speculation and must submit more than just conclusory assertions that an issue of material fact exists to withstand summary judgment. *See Cantwell v. City of Boise,* 146 Idaho 127, 133, 191 P.3d 205, 211 (2008). Here, Idaho Power has pointed to no factual disputes that preclude dismissal at this time. The question is purely legal. Thus, even if the Commission chooses to apply the summary judgment rule, there is no genuine issue of material fact that PURPA bars Idaho Power's proposed re-examination of Movants' fixed-price avoided cost rates.

IV. CONCLUSION

Idaho Power mis-states Movants' motivation for intervening and filing a Motion to Dismiss, by asserting:

> The intervenors in this proceeding are unabashedly concerned with only two things: (1) promoting the unlimited development of additional wind generation and (2) maximizing the potential revenue to their own individual projects – regardless of the effects upon the rest of the bulk system or the many other customers of the utility.

Answer at 11. Movants have no current interest in the development of additional wind generation in Idaho. Nevertheless, Idaho Power's proposals, including the Application, which target wind QFs in order to unilaterally amend signed and approved contracts, have a chilling effect on long-term investment by prominent and reputable investors, which does not serve the long-term interests of electricity consumers in Idaho. Secondly, the Movants will support initiatives to improve system reliability and customer satisfaction, provided such initiatives comply with contractual legally enforceable obligations and consider the interests of all stakeholders. The terms of Movants' FESAs were determined by Idaho Power and approved by

the Commission, and Movants are simply complying with the terms set forth therein. Movants' primary motivation is to preserve the terms and economic balance of the FESAs over the full term, as they were stipulated to and agreed to by Idaho Power and approved by the Commission – which established the basis for substantial investments in the State of Idaho. Furthermore, Movants would like the Commission to discourage Idaho Power from engaging in what is becoming a pattern of repeated attempts to directly or indirectly "move the goal posts" as this has substantial direct and indirect costs to Movants and the sector.

For the reasons set forth herein and in the Motion to Dismiss, Movants respectfully maintain that the Commission should issue the following relief:

- The Commission should dismiss Idaho Power's Application in its entirety and allow the Company to re-file an Application that does not recommend applying a new or updated wind integration charge to existing contractual legally enforceable obligations.
- Alternatively, at the bare minimum, the Commission should dismiss and strike from the record the portions of Idaho Power's Application and testimony that recommend that the Commission alter the rates and terms in existing contractual legally enforceable obligations. Attachment 1 to the Motion to Dismiss is a copy of the Application that demonstrates in strike-out the portions that should be stricken from the record. Additionally, the following portions of the direct testimony should be stricken: Youngblood, DI at p. 8 lns. 8-13, p. 11 lns. 5-9 and 15, p. 12 lns. 8-13 and 19-22, p. 19 ln.4 through p. 23 ln. 10, Ex, Nos. 2, 4; DeVol, DI at p. 22 lns. 1-4.

- Finally, the Commission should instruct Idaho Power that efforts to unilaterally modify existing contractual relationships with QFs are preempted and inconsistent with this Commission's orders, and will not be entertained in this docket or any future dockets.

Respectfully submitted on February 28, 2014.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th day of February, 2014, a true and correct copy of the within and foregoing **REPLY IN SUPPORT OF MOTION TO DISMISS** was served as shown to:

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